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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 834

WYLIE MANUFACTURING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WYLIE MANUFACTURING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Wylie Manufacturing Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on October 17, 1969.

CITATIONS TO OPINIONS BELOW

The opinions of the National Labor Relations Board are reported at 162 NLRB 799 (1967) and 166 NLRB No. 114 (1968) and are printed in Appendix B hereto at 7b and 41b, respectively. The opinion of the United States Court of Appeals for the Tenth Circuit, is printed in Appendix B hereto at 1b.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on October 17, 1969 (*Infra*, at 1b) and judgment was entered on November 12, 1969 (Cert. Rec. p. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the National Labor Relations Board has the authority to issue a bargaining order on the basis of signed authorization cards even though it has found that some of those cards were obtained through illegal union intimidation and coercion.

2. Whether the NLRB may set aside a secret ballot election and issue a bargaining order on the basis of employer misconduct affecting a minority of employees and at the same time order bargaining on the basis of an authorization card count when there has been serious union misconduct also affecting a minority of employees.

STATUTE INVOLVED

The statutory provisions involved are Sections 7, 8(a)(1), 8(a)(5) and 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(5) and 160(c). They are printed in Appendix A, *infra*, at 1a.

STATEMENT

On March 29, 1966, the National Labor Relations Board conducted a secret ballot election in which a majority of Petitioner's thirty-six employees voted not to be repre-

sented by Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO (*Infra,* at 2b).

Thereafter, the losing Union filed objections to the election, and filed unfair labor practice charges against the Company. These matters were consolidated for trial.

On September 28, 1966, a Trial Examiner of the National Labor Relations Board issued a decision finding that certain of Petitioner's supervisors had made improper statements to six employees in the course of the election campaign. He found that these statements justified setting aside the election and that they constituted violations of Section 8(a)(1) of the Act (*Infra,* at 8b).

He further found that the Employer had refused a request for recognition made prior to the election, on the basis of authorization cards, and that such refusal to grant recognition constituted a violation of Section 8(a)(5) of the Act. On the basis of the above 8(a)(1) and 8(a)(5) findings, he ordered the Company to bargain with the Union despite the fact that the Union had not secured majority status in the election. This decision was affirmed by the Board, without modification, on January 10, 1967 (*Infra,* at 7b).

Subsequently, an employee of Petitioner, one Fidencio Hernandez, provided Petitioner with a letter which he had sent on behalf of the employees to his congressional representative, expressing the employees' indignation at having the five employees who were originally responsible for starting the Union drive continue to press for representation against the wishes of the majority of the employees. Hernandez stated that it was the desire of the majority of the employees to abide by what they considered an honest secret ballot election. Hernandez further states that "As

for the cards we signed, they were signed only after being harassed, threatened and pushed around to the point where the only way we could get these people off our backs was to do so" (R. 264-65).* Hernandez also circulated a petition to which thirty out of Petitioner's thirty-six employees affixed their signatures. The petition stated that the employees "no longer wanted them [Local 850] as a bargaining agent" (R. 172, 211).

Acting on Hernandez' information and affidavits from two other employees, both of whom confirmed that cards had indeed been obtained by Union threats, intimidation and coercion, Petitioner requested the Board to reopen the proceeding for the taking of further evidence (R. 258). Although General Counsel for the National Labor Relations Board opposed the motion to reopen, the Board granted the petition and a further hearing was held on June 28, 1967 (R. 269, 295).

The Trial Examiner, in his second decision, found that three employees had been threatened by the Union solicitors with the loss of their jobs if they did not sign cards for the Union (*Infra*, at 55b-56b). He nevertheless refused to rescind or modify his recommended order to bargain on the ground that, despite his findings of Union intimidation and coercion, there were still enough authorization cards not shown to have been obtained by coercion to make up a "valid majority" (*Infra*, at 56b).

His decision was affirmed in its entirety by the National Labor Relations Board. In a decision issued October 17, 1969, the Court of Appeals for the Tenth Circuit granted enforcement of the Board's order, including that portion of it requiring Petitioner to bargain with the Union (*Infra*, at 1a).

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* "R." references are to the appendix filed in the Court of Appeals and filed herein as a Supplemental Transcript of Record.

REASONS FOR GRANTING THE WRIT

1. The Question Presented is of Very Real Importance in the Administration of the National Labor Relations Act as Amended.

This Court, in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), approved the authority of the National Labor Relations Board to issue bargaining orders in appropriate cases as a remedy for employer unfair labor practices. The decision in that case, however, was clearly limited to situations in which (345 U.S. at 579):

> "[U]nion authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid alternate route to majority status."

In the course of its opinion the Court also stated (345 U.S. at 592):

> "A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion."

The position taken by the National Labor Relations Board and approved by the Court of Appeals for the Tenth Circuit in this case, is to the effect that a valid majority status sufficient to support a bargaining order will be presumed upon the introduction by the General Counsel of authorization cards signed by a majority of the employees, even if the union has resorted to coercion in obtaining them, unless the employer can show by direct evidence that the coercion actually affected a sufficient number of individual employees to destroy the otherwise presumed majority status.

We respectfully submit such a mathematical and mechanistic approach is contrary to the spirit and intent of this Court's decision in *Gissel* and that a Board bargaining or-

der issued under these circumstances cannot be said to effectuate the policies of the National Labor Relations Act.

This Court said, in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602-03 (1969):

> "As for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards*** and rule that there was no majority if the standards were not satisfied."

In this case, the Board itself found that there were more than mere "irregularities." The Board found that there were three instances of proven Union coercion and intimidation. The Board's "customary standards" should therefore have been applied in at least as strict a way to the generally unpoliced atmosphere in which cards are solicited as they are applied to the more closely supervised and safeguarded procedures involved in secret ballot elections, which as this Court noted in *Gissel* is considered by the Board to be the preferred route (395 U.S. at 596).

The Board, with the approval of the courts, has adopted "customary standards" and refused to accept the results of even a secret ballot election as determinative of majority status in cases where the evidence demonstrates that illegal and coercive tactics have been utilized by an employer, *even though the evidence showed only that the coercion was directed to a small minority of the total voting group.*

For example, in *Intercontinental Mfg. Co.*, 167 NLRB No. 105 (1967), the union had been defeated by 110 votes in a 730 employee unit but the Board set aside the election because *two* supervisors made statements to *six* employees which "could have a restraining or coercive effect." The Board in ruling that the number of employees affected can-

not be the determinative factor relied on precisely the standard we contend should have been applied here:

> "While it is impossible to measure the effect of interference upon the exercise of their right of franchise, either on the employees directly concerned or on other employees who might have learned of the interference, it is sufficient, as here, that the employer in his conduct, has created a situation which inhibits free choice by the employees."

Similarly, in *Standard Knitting Mills Co.*, 172 NLRB No. 114 (1968), the Board held that misconduct involving four employees was not *de minimis* even though the total employee complement was nearly 3,000.

If the evidence in the above-cited cases was considered sufficient to set aside a *secret ballot election*, the preferred route, surely the application of the Board's customary standards requires a finding that three instances of union coercion in a thirty-six man unit prohibits reliance on a purported card majority, which is almost unanimously considered by other Courts of Appeal to be "a notoriously unreliable method of determining majority status." *E.g.*, *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2nd Cir. 1965); *NLRB* v. *River Togs, Inc.*, 382 F.2d 198, 206 n. 10 (2d Cir. 1967); *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967); *NLRB* v. *Southland Paint Co.*, 394 F.2d 717, 725-29 (5th Cir. 1968); *NLRB* v. *Fashion Fair, Inc.*, 399 F.2d 764, 768 (6th Cir. 1968); *NLRB* v. *Arkansas Grain Corp.*, 390 F.2d 824, 829 n. 4 (8th Cir. 1968).

And in the case at bar, the Board and the Court below have set aside a secret ballot election on the basis of the testimony of *six* employees as to allegedly improper comments made to them by the Company supervisors, even though it was established that five of these six were principal union organizers (R. 23-25, 43, 53-56, 69-72, 80-85)

and none of the six were in any way inhibited by the alleged improper conduct in their continued efforts on behalf of the union. (R. 25, 27, 36, 45, 56, 63-65, 75, 89). But findings of union coercion as to *three* employees have been found in this case to be an insufficient number of instances of union coercion to create a situation which inhibits free choice by the employees.

The question raised here, then, is whether the Board may, under *Gissel,* properly apply one set of standards to employee misconduct and a different set of standards to union misconduct; and one set of standards to secret ballot elections and a less strict set of standards to authorization card counts. Implicit in these questions is the further policy consideration of whether a new election is not the only appropriate remedy if the evidence in any given case shows that neither the atmosphere in which cards were obtained nor in which the election campaign was conducted was free from improper union and employer conduct.

These questions are important not only to petitioner, but to employers and unions generally, and to the total interpretation and implementation of public policy under the Act.

2. The Decision of the Board and of the Tenth Circuit is Contrary, in Principle, to a Line of Precedent Established by Other United States Courts of Appeal.

Other United States Courts of Appeal have found that misconduct of either the employer or the union, even though affecting only a minority of employees, is sufficient to taint either a secret ballot election or an authorization card count. The instant decision is contrary, in principle, to these decisions.

In *NLRB* v. *Clement Bros. Co.,* 407 F.2d 1027 (5th Cir. 1969), the holding of the court is to the effect that seven

proven incidents of Union coercion were sufficient to invalidate a finding of majority status based on authorization cards, even though the union had submitted eighty signed cards out of a total of ninety-seven employees.

Similarly, in *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967), affidavits signed by four employees to the effect that they had been threatened with loss of employment by the union solicitors were found sufficient to invalidate a finding of majority status based on authorization cards, even though the four employees had successfully resisted the threats and refused to sign cards.

The National Labor Relations Board and the Courts of Appeal of other circuits have also rejected a "numbers test" with respect to employer misconduct. Judge Learned Hand discussed this at some length in a decision of the Second Circuit Court of Appeals, in the course of which he refers to and discusses a case in still another circuit—the Third Circuit. In *National Labor Relations Board* v. *James Thompson Co.*, 208 F.2d 743, 747 (2nd Cir. 1953), he said:

* * *

> "In National Labor Relations Board v. John Engelhorn & Sons, 134 F.2d 553, 556, the Third Circuit ordered an employer to deal with a union that the Board had certified, although it did not have a majority vote, because a rival union, which did have a majority, was shown to have used improper persuasion to get the votes of 'six or seven' out of eighty employees in the plant.' The vote had been in the proportion of sixteen to fourteen, and even after deduction of the seven the disestablished union had a clear majority. In avowed consonance with the doctrine laid down in National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, 61 S.Ct. 358, 85 L.Ed. 368, the Court of Appeals said that it was true that 'the employer's

> unfair labor practices may not have affected all or even a majority of the employees so as to be a direct cause of their affiliating with Local 174'—the successful union—but nevertheless that this was 'of no consequence. All that need be established to show a violation of § 8 is conduct of an employer which is defined therein as an unfair labor practice. That section does not require proof that the proscribed conduct had its desired effect.' It will therefore be observed that this was more than a holding that it is not necessary to prove that the unfair labor practice has changed the vote of the individuals addressed; and it is in addition a holding that *it is not necessary to prove that the practice reached enough employees to change the majority into a minority.* The Board itself in several cases has held in 'representation elections' that, in order to throw out the result of an election, it is not necessary to show that the unfair practice reached enough employees to destroy the majority. * * *" (Emphasis supplied.)

In the Court of Appeals we specifically challenged the Trial Examiner's conclusion to the effect that the card majority should be sustained because it had not been directly proven "that the practice reached enough employees to change the majority into a minority." Although the Trial Examiner's opinion was affirmed without comment by the Board, the Court of Appeals nevertheless failed to deal directly with the issue and merely stated in its opinion that "the evidence had established no pattern of threats, coercion or intimidation" in the union conduct (*Infra,* at 5b).

The issue should not be permitted to be so easily avoided. To do so is contrary to established precedent in other circuits. Moreover, both the Board and the Court in this case have found that allegedly improper employer statements to six employees established a sufficient "pattern"

to justify setting aside a secret ballot election. Yet the effect of the holding is that the Board's own finding of three instances of direct union coercion does not establish a sufficient "pattern" to justify setting aside a generally less reliable authorization card election.[1]

Again, we submit, that under such circumstances a bargaining order is contrary to the overriding policy of the act of protecting employee free choice and the only appropriate remedy is to order another election which can be conducted free of unlawful interference by either side.

We respectfully submit that the Court of Appeals for the Tenth Circuit, in accepting the Trial Examiner's view that a bargaining order may be based upon authorization cards even in the face of its own findings of union intimidation and coercion in obtaining some of those cards, should not be permitted to rest upon the theory that a little intimidation is all right, so long as it does not affect a majority of the employees. Such a test is directly contrary, in principle, to the decisions of other Courts of Appeal.

This conflict in a significant area of interpretation of the National Labor Relations Act, should we submit, be resolved by this Court.

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[1] Furthermore, while we recognize the limitations on judicial review of factual findings, we should point out that we would urge that judicial review of the record did indicate that there were in fact additional instances of Union coercion which the Trial Examiner either ignored or erroneously failed to credit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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Dated at Chicago, Illinois
this 5th day of December, 1969.

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APPENDIX A

STATUTES INVOLVED

National Labor Relations Act, as amended, Title 29 U.S.C.

SECTION 157:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SECTION 158:

> (a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SECTION 160(c): *inter alia,*

> "(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 56-69—SEPTEMBER TERM, 1969

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WYLIE MANUFACTURING COMPANY

Respondent

On Application for Enforcement of an Order of the National Labor Relations Board

---

Before PHILLIPS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The National Labor Relations Board found that respondent Wylie Manufacturing Company had committed unfair labor practices in violation of § 8(a)(1) and (5) of the National Labor Relations Act as amended, 29 U.S.C. § 151 et seq., and petitions for enforcement of its order. See 162 NLRB 799 and 170 NLRB No. 112.

The Company manufactures asphalt equipment in Oklahoma City, Oklahoma. During the latter part of February,

1966, Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO, began an organizational campaign among the Company's employees. The Company soon became aware of the activity. Beginning on February 25 and continuing until the latter part of March the plant manager and two foremen interrogated various employees and made statements to them derogatory of the Union. On March 7 about 30 of 36 unit employees had signed cards authorizing the Union to represent them in collective bargaining and the Union made a written request for recognition and bargaining negotiations. The Company refused the request. The Union lost a consent election held on March 29 by a vote of 18 to 17 and thereafter filed with the Board a complaint charging unfair labor practices. After a hearing the Examiner found violations of § 8(a)(1) and (5). The Board affirmed the Examiner in all respects.

The Company then petitioned to reopen the proceedings on the ground that the authorization cards were obtained by coercion. The Board granted the request and another hearing was held. The Examiner found that out of 26 valid and unambiguous authorization cards one had been secured by the coercive conduct of one employee. He held that this was insufficient "to establish a pervasive pattern of threats coercion or intimidation" in the Union's campaign to secure the cards. The Board affirmed the Examiner.

No good purpose will be served by detailing the conflicting testimony. Six employees testified to a variety of statements by three supervisors which, if believed, were sufficient to establish § 8(a)(1) violations. The three supervisors denied the statements. At the hearing on the coercion issue the Company presented five witnesses and the General Counsel two. The Examiner carefully delineated the reasons for his credibility findings. Credibility find-

ings are peculiarly within the province of the Examiner and the Board and are ordinarily entitled to affirmance on review. American Sanitary Products Co. v. National Labor Relations Board, 10 Cir., 382 F.2d 53, 55, and National Labor Relations Board v. United Nuclear Corporation, 10 Cir., 381 F.2d 972, 976. The Company attacks the application of the rule on two grounds. It points out that the Examiner discredited employee Mosley, as prone to exaggerate, when considering his testimony regarding the unfair labor practices charged to the Company but believed his testimony at the second hearing. The Examiner was aware of the situation and commented thereon. It appears to us that the Examiner's decision to credit Mosley's denial of threats was based primarily on defects in the testimony that the threats were made. We cannot say that the decision to believe Mosley on the coercion issue was wrong.

The Company also contends that the Examiner should have reevaluated his first hearing credibility findings in the light of the evidence of union coercion adduced at the second hearing. Of those employees previously found credible, Dalton was the only one whose character was impugned at the second hearing. Dalton did not testify at that hearing. The finding that Dalton coerced some employees to sign cards does not necessarily mean that he lied concerning management statements to him of threats and reprisals. We are impressed with the care used by the Examiner in making his credibility findings and we will not disturb them.

The Board found that the Company violated § 8(a)(1) by interrogation of employees, by threats of reprisals, and by promises of benefits, all with the intent of undermining employees' support of the Union. The Company says that it is not responsible for its supervisors' anti-union activity because the supervisors were directed by a superior not to make any promises or threats relating to union activity.

The record shows that the promises and threats were made both before and after the directions from the superior. In the situation presented supervisory status is sufficient to charge the employer with responsibility. See Furr's, Inc. v. National Labor Relations Board, 10 Cir., 381 F.2d 562, 566, cert. denied 389 U.S. 840. The argument that it is improbable that the supervisors would violate the order of a superior goes to the weight of the testimony. We accept the findings of the Examiner.

The Company says that predictions of what supervisors reasonably believe would be likely consequences of unionism are protected speech. See § 8(c) of the Act. In National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 618-619, the Court distinguished between statements of what an employer reasonably believes will be the likely economic consequences of unionization beyond his control and threats of reprisals to be taken on the employer's own volition. In our opinion the statements relating to plant removal, more pay without the Union, reduced hours, welder certification, and discharge of deadbeats come within the second category and are not protected.

The Company argues that the statements were not improper because none of the complaining employees discontinued union activities. We are not persuaded. Statements in violation of the Act do not become permissible because they fail to dissuade some of the employees from union adherence. Something happened between March 7 and March 29 to change the minds of several who had signed authorization cards. It is reasonable to infer that company conduct which failed to deter strong union adherents did affect other employees.

Credible evidence that company supervisors acted to dissipate union support "by threats of reprisal and prom-

ises of benefits together with interrogation in a context coercive in nature" suffices to sustain a § 8(a)(1) violation. National Labor Relations Board v. Merrill, 10 Cir., 388 F.2d 514, 517; see also American Sanitary Products Co. v. National Labor Relations Board, 10 Cir., 382 F.2d 53, 55, and Betts Baking Co. v. National Labor Relations Board, 10 Cir., 380 F.2d 199, 201. Upon our examination of the entire record we are convinced that the Examiner's findings adopted by the Board are supported by substantial evidence and must be accepted by us. See Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488.

The Company attacks the Board's decision that the Union had an uncoerced majority on March 7, 1966. The Examiner found that three employees were coerced into signing authorization cards but that only one of the three cards was included in the 30 mailed to the Company on March 7; and even though that card was not among the 26 introduced in the first hearing, he took coercion into account by reducing the card count from 26 to 25. The Company charges that this is playing a numbers game. We are not persuaded. The Examiner, in addition to finding that the Union had a technical majority, concluded that the evidence had established no pattern of threats, coercion or intimidation. This conclusion has substantial support in the record.

The Company insists that even if the Board's conclusions about Company and Union conduct are separately acceptable, their juxtaposition evidences inconsistency in treatment. We are not impressed. When the record is viewed as a whole, it does not disclose inconsistency by the Examiner in his evaluation of the coercive effect of statements by company representatives on the one hand and union adherents on the other.

The Company argues that in any event the remedy should be a rerun election rather than a bargaining order.

The Company points out that after the election was lost by the Union, 30 of the 36 members of the unit signed a petition saying that they did not wish the Union to represent them as bargaining agent. This action came nearly a month after the Union had submitted cards showing that a substantial majority favored representation by the Union. The Board has authority to issue a bargaining order "without first requiring the union to show that it has been able to maintain its majority status" even though it is clear that a union which once held cards from a majority "represents only a minority when the bargaining order is entered." National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 610, and cases there cited; see also National Labor Relations Board v. Merrill, 10 Cir., ... F.2d ..., opinion filed August 12, 1969, and National Labor Relations Board v. Groendyke Transport, Inc., 10 Cir., ... F.2d ..., opinion filed September 11, 1969.

It may be that a refusal to bargain upon a showing of a card majority is not a § 8(a)(5) violation regardless of motivation. Cf. Gissel, 395 U.S. 575, 594, 600, and 608. The Board can consider an employer's unfair labor practices in the light of their effect on election conditions and if it finds that there is slight possibility of ensuring a fair rerun election because of past conduct and that a bargaining order is the better protection, it may issue such an order. Id. at 614-615. In the case at bar the Board found that the employer's violations of § 8(a)(1) were intended to prevent the selection of a bargaining representative and, in fact, "did prevent a fair election."

We believe that the matter of disposition of the case is controlled by Gissel. That decision disposed of four cases, one of which was Sinclair Co. v. National Labor Relations Board. In that case the First Circuit had left undisturbed

a Board finding that employer threats were so coercive that, even absent a § 8(a)(5) violation, "a bargaining order would have been necessary to repair the unlawful effect of those threats." Gissel, 395 U.S. 575, 615; see also National Labor Relations Board v. Sinclair Company, 1 Cir., 397 F.2d 157. The case at bar comes within the pattern of Sinclair. See Retail Store Employees Union Local 880 v. National Labor Relations Board, D.C. Cir., ... F.2d ..., decided July 10, 1969. In our opinion the Board did not abuse its discretion in entering a bargaining order as part of the remedy for the § 8(a)(1) violations.

The petition for enforcement is granted.

Before The National Labor Relations Board
Wylie Manufacturing Company and Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO.

Cases 16—CA—2638 and 16—RC—4226. January 10, 1967

DECISION AND ORDER

On September 28, 1966, Trial Examiner Harry H. Kuskin issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in other alleged violations and recommended dismissal of such allegations. The Trial Examiner further recommended setting aside the election held on March 29, 1966, in Case 16—RC—4226. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Zagoria].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

[The Board adopted the Trial Examiner's Recommended Order.]

[The Board dismissed the complaint insofar as it alleges unfair labor practices other than as found herein by the Board.]

[The Board dismissed the petition for certification of representatives, filed by the Petitioner in Case 16—RC—4226 and vacated all proceedings held thereunder.]

TRIAL EXAMINER'S DECISION

Statement of the Case

This consolidated proceeding was heard before Trial Examiner Harry H. Kuskin at Oklahoma City, Oklahoma, on June 28, 1966, and had its genesis in the efforts of Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, to become the exclusive bargaining representative of employees of Wylie Manufacturing Company,[1] herein called Respondent or Respondent-Employer. The representation proceeding

[1] The name appears herein as amended at the hearing.

in Case 16—RC—4226 was initiated by a petition filed by the Union on March 9, 1966;[2] it was followed by a stipulation for certification upon consent election and then by an election on March 29, which the Union lost and to which the Union filed timely objections. The complaint in Case 16—CA—2638, which was amended at the hearing herein, issued on May 5. The two cases were consolidated by the Regional Director for Region 16 on June 13. The questions presented are (1) whether Respondent-Employer engaged in conduct which warrants setting aside the election; (2) whether Respondent-Employer, in violation of Section 8(a)(1), interfered with, restrained, and coerced employees in the exercise of their Section 7 rights; and (3) if it did, whether the Union represented a majority of Respondent-Employer's employees in an appropriate unit at the time it requested bargaining, so that Respondent-Employer's refusal to bargain violated Section 8(a)(5) of the Act.

Upon the entire record,[3] including my observation of the witnesses, and after due consideration of the briefs of the General Counsel and Respondent-Employer, I make the following:

Findings of Fact

I. The Business of Respondent-Employer

Respondent-Employer is an Oklahoma corporation and is a wholly owned subsidiary of E. D. Etnyre and Company, an Illinois corporation; it has its only plant and office in Oklahoma City, Oklahoma. The complaint, as amended, alleges, and Respondent admits, that it is engaged in the business of manufacturing asphalt equipment and that during the past 12 months, which period is representative of

[2] All dates mentioned hereinafter are in 1966.

[3] As corrected by my Order Correcting Transcript dated September 14.

all times material herein, it purchased and caused to be shipped to its plant from outside Oklahoma materials valued in excess of $50,000.

I find, upon the foregoing, that Respondent-Employer is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, as Respondent-Employer stipulated, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background—sequence of events*

Organizational activity among Respondent-Employer's employees was initiated by the Union and began about the last week in February. On February 25, employees were individually summoned to the office of Plant Manager John Allsbrook where Allsbrook had conversations with them which, it is alleged, constituted threats and interrogation in contravention of the Act. Thereafter, on February 28, the Union held a meeting at the union hall which was attended by some 10 employees of Respondent-Employer. Among those present in behalf of the Union was Edd C. Foster, business representative. The matter of authorization cards was discussed and, according to Foster, the employees were told that cards would be signed, in duplicate, by each individual, one to be submitted to Respondent-Employer in connection with a recognition request and the second one to be used only if Respondent-Employer failed to recognize the Union, and that in the latter event it would be necessary to file a petition with the Board along with the second card to demonstrate the Union's showing among the employees.

About eight or nine of the employees present signed cards, in duplicate, at the meeting.

It is apparent that Respondent-Employer already knew about the organizational activity at the plant. Thus, Allsbrook testified that he learned about the union activity "about the middle of February." Indeed, as already indicated, 3 days before the above meeting at the union hall on February 28, Allsbrook summoned employees to his office and talked to them about the Union.[4] These conversations and others during the month of March involving other supervisors as well, which are set forth hereinafter in some detail, constitute the sum and substance of the 8(a)(1) allegations herein.

By March 7, the Union had in its possession about 30 signed authorization cards, all of which were signed at or since the meeting. By letter, dated March 7, the Union advised Respondent-Employer of its majority status in a production and maintenance unit at its plant and requested, *inter alia,* recognition in such unit and the commencement of collective-bargaining negotiations. Enclosed with the letter were 30 authorization cards of plant employees whose names were listed in the letter and photocopies thereof, the latter to be retained by Respondent-Employer and the authorization cards themselves to be returned to the Union after Respondent-Employer had examined them and compared the signatures with those on its payroll. This letter and its contents were received by Respondent-Employer on March 8 or 9; it was brought to the attention of James A.

[4] Allsbrook acknowledged talking to the men about the Union, saying, "I asked them some questions."

Nelson,[5] vice president of Respondent-Employer with responsibility for its labor relations policy. According to Nelson, he did not examine the enclosures, which he assumed were authorization cards because "[he] had the feeling that the cards in this matter are not an indication of what the employees' real desires are, and the cards, as such, were not of interest to [him]." By an answering letter of March 10, Nelson returned "the material submitted with [the Union's] letter of March 7, 1966, which material we have not examined." And, by way of reply, to the request for recognition, Nelson "suggest[ed] that signature cards in themselves are notoriously inaccurate in describing the desires of individuals to be represented by a union and that such a desire can only be determined when, as and if an election should be authorized by, and held under the auspices of the National Labor Relations Board." On March 9, a petition was filed by the Union with the Regional Director for Region 16 of the Board in Case 16—RC—4226 for an election among the above employees. Thereafter, also as already indicated, a stipulation for certification upon consent election was entered into by the parties; the stipulation was approved by the Regional Director on March 21 and an election was held on March 29, which the Union lost by one vote. The tally of ballots of that election shows that, of approximately 36 employees, 35 cast ballots, of which 17 were for the Union and 18 were against the Union. On April 1, the Union filed timely objections to conduct affecting the results of the election. Three days later, the Union filed a charge upon which the complaint in this proceeding is based. Thereafter, on May 5, the Regional Director issued his report on objections recommending that, as he was about to issue a Complaint and Notice of Hearing in Case 16—CA—2638 and as the objections are

[5] Nelson has his offices in Oregon, Illinois, but happened to be at the Oklahoma City plant on that day.

also the subject of the unfair labor practice charge filed by the Union, Case 16—RC—4226 should be consolidated with Case 16—CA—2638 for the purpose of hearing. Accordingly, when the complaint herein was issued, at a time subsequent to the adoption by the Board of the Regional Director's report on objections, it was issued as a consolidated proceeding.

B. *Interference, restraint, and coercion*

The testimony offered in support of the complaint's allegations of interference, restraint, and coercion relates to various conversations between individual representatives of management, on the one hand, and individual employees or, at times, several employees, on the other hand. These conversations span a period beginning with February 25 and ending shortly before the election of March 29. The supervisory status of the participating management representatives, i.e., Plant Manager John Allsbrook, Sheet Metal Foreman Arnold Garrison, and Welding Foreman Raymond Roller, is not in issue. However, most of the statements attributed to them by the witnesses for the General Counsel are controverted by their unqualified denials. I shall proceed, therefore, to a consideration of the testimony concerning each incident.

1. The individual interviews on February 25.

The record reveals that, on this day, Allsbrook caused employees to be sent to his office individually during working hours and that he engaged them in conversation about the Union. Allsbrook admitted at one point that Jack W. Underwood, Jack Mosley, Ted L. Handley, Werner Steinweiss, and at least a couple more were called into his office that day. At another point, he also named Kenneth W.

Dalton as an interviewee. All these employees, except Steinweiss, testified in this proceeding.[6]

According to Dalton, Welding Foreman Roller came to him while he was at work and told him that Allsbrook wanted to talk to him in the office. Dalton testified that during the conversation that ensued in Allsbrook's office, Allsbrook asked him if he knew anything about the union talk in the shop, and why the men felt they needed a union. His answer to the first query was that he had been asked to sign a card that he had said he would, and that, if there was an election, he would vote for the Union; and he answered the second query by referring to some complaints that the men had about conditions in the plant. It is Dalton's further testimony that during the conversation, Allsbrook wrote figures of $2.60, $2.15, and $2.05 on a piece of paper, indicating that the first figure was the top wage rate for certified welders in union shops in Oklahoma City, but that he doubted that there were more than two or three men in the shop who could pass the welder's certification test and that most of the Company's welders would fall into the $2.05 or $2.15 bracket, that the men would be on a 40 hour week instead of the current 50 hour week because Vice President Nelson of Respondent-Employer "would cut the hours if he had to build another building in order to do it, and if this didn't solve the problem he could close her down and move her back to Illinois."

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[6] At the time of the hearing, Mosley had quit Respondent's employ. While there is testimony as to Mosley's employment history, some of which is in dispute, I find it unnecessary to make findings thereon. The reason for his quitting is not material to the issues herein, nor would it affect my credibility findings as to him. Nor do I find it necessary to make findings as to testimony concerning Handley's and Dalton's employment history. Both of them were still employed at the time of the hearing, and even granting that they had been reprimanded for not attending to their work, I find no warrant for regarding this as an operative factor in determining their credibility.

According to employee Underwood, he was told by Dalton, who had just been in Allsbrook's office that day, that Allsbrook wanted to talk with him in the office. Once in the office, Allsbrook asked him to shut the door and sit down. Whereupon Allsbrook inquired whether he knew anything about the Union and he told Allsbrook that he had heard a rumor about it; Allsbrook also inquired whether he knew what the wage scale was for welders, to which he replied that he did not weld and did not know the wage scale. Also according to Underwood, Allsbrook said that he was going to talk to everybody in the plant, and asked him to go into the plant and send in Steinweiss.[7]

According to Mosley, Allsbrook sent word, either through Roller or Handley, that he come to the office. Mosley testified that, while in the office, Allsbrook asked him if he knew anything about the Union, how he felt about the Union, why it was started, and who started it. As to the latter, Mosley answered that he did not know. And as to the reason for the Union in the plant, he adverted to certain working conditions and the belligerent attitude of supervision when the men complained. During the conversation, Allsbrook, according to Mosley, wrote figures on a scratch pad purporting to be the union pay scale at various companies in Oklahoma City, and asserted that, with respect to welders employed by Respondent-Employer, "it would be a cut in wages of 15 to 25 cents an hour because the welder would have to be certified and they just didn't need that kind of welders out there . . . ."[8] It is also Mosley's testimony that Allsbrook said at that time that he was going to get a list of the men implicated in union activity and "he was going to

[7] As already indicated Steinweiss did not testify.

[8] Mosley testified, too, that Allsbrook showed him the rate of a certified welder and a noncertified welder, giving the latter rate as $2.15; and that his going rate was $2.35.

fire every one of them until he got the right man that started it, that had started it."

According to Handley, while he was in Allsbrook's office on that day,[9] Allsbrook asked him what he knew about the union talk and he replied that he did not know but that Allsbrook could not stop it. At this point, also according to Handley, Allsbrook asked if Handley knew that by bringing the Union into the plant, the welders would have to take a certification test, that helpers would have to take a cut in pay and that he, Allsbrook, had spoken to Mr. Etnyre of the parent company that morning and that his information was that "they would either have to build another building and hire more men which would cut down on [their] overtime or that they would close the plant down and move it back to Illinois." Handley also recalled that Allsbrook told him that he "would call each and every man

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[9] Handley testified that, just before this, he had had a conversation with Roller at his place of work, as follows: Roller approached Mosley and him while they were working on a 31-40 frame and asked him whether he knew who started the Union. When he answered that he had started it, Roller said, "if you are the one who started this union talk that you might as well get ready to get your check because this is your last day." Whereupon, he asked Roller to get the check for him. Roller then left. Within 10 or 15 minutes, he was called into the office of Allsbrook. Roller, in his testimony, specifically denied that he interrogated Handley or that he threatened Handley as Handley testified. In view of the fact that Mosley, who was assertedly also present, made no mention in his testimony of this conversation and in view of the fact that Handley testified that, in answer to the same question by Allsbrook during the interview shortly thereafter, he answered that he did not know who started the union talk, and in view of the fact that there appears to have been no mention made by Handley to Allsbrook of this claimed threat of discharge by Roller, I entertain serious doubt as to whether Handley testified truthfully in this regard. I therefore credit Roller's denial.

While I have credited Handley with respect to the content of his interview with Allsbrook, I do so because his testimony is consistent with that of other employees herein concerning the content of their interviews with Allsbrook that same day.

into the office and talk to them personally to put a stop to the Union."

On his direct testimony, Allsbrook denied *seriatim* each of the above statements involving interrogation and threats attributed to him by Dalton, Underwood, Mosley, and Handley. On cross-examination, however, Allsbrook admitted certain acts of interrogation, namely, that he asked those interviewed what they knew about the Union and what they had heard about the Union in the plant.[10] And with reference to the matter of wage discussions, he testified that such discussions consisted of comparing with each of the interviewees what the welder's pay scale would be if they worked only 40 hours at the union scale against what they were earning "if they worked 50 hours regular time."[11] Although Allsbrook denied, during cross-examination, telling the men that their hours could be cut back to 40 hours a week, if the Union came into the plant, he did admit that he let them draw their own conclusions.[12] In the circumstances, I am satisfied that the unmistakable innuendo of Allsbrook's admitted remarks during these interviews was that Respondent-Employer would reduce the working hours per week for welders from 50 to 40 if the Union came into the plant.

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[10] Allsbrook admitted further that he held these interviews because of the union talk and in an effort "to get at the base of it" and solve the employees' grievances so they would not want a union.

[11] With respect to Dalton's Interview, Allsbrook testified that he wrote on a pad, for Dalton to see, the welder's rate paid by another company, which he saw in a union advertisement in the newspaper, and which he represented as the union rate applicable to welders.

[12] Significantly, while Respondent claimed in its brief that Allsbrook's comments in this respect were motivated by the fact that this had happened in his experience at another plant of another company in 1941, Allsbrook did not so present it to the employees, as he admittedly did not tell the interviewees of this experience.

In view of all the foregoing, I credit the parallel, consistent, and, in a sense, mutually corroborative testimony of Dalton, Mosley, and Handley on this point and find, contrary to Allsbrook's denial, that he threatened a reduction of working hours to 40 hours per week and lower earnings if the Union came into the plant. And I find also, in accordance with the further parallel testimony of Dalton and Handley, which I credit, that the threat to them went even further in that Allsbrook said to each, in effect, that Respondent might build another plant if necessary to accomplish the reduction in hours or might even close the plant or move it to Illinois.[13]

The interrogation that occurred in the office of Allsbrook continued thereafter, according to the uncontradicted testimony of Mosley. He testified that Roller approached him after he came out of Allsbrook's office and asked him "who in the hell was starting this union talk," and that he, in turn, replied that he did not know but that he was going to do everything he could to get the Union into the plant. There is also testimony by Dalton that when he came out of Allsbrook's office that day, Roller asked him what Allsbrook had to say, and that he, Dalton, told Roller that Allsbrook acted as though he did not believe Dalton's statement about not knowing anything concerning the Union. Whereupon, also according to Dalton, Roller said, "you are lying about it, aren't you." Roller denied having any con-

[13] I have adverted to testimony by Mosley of a threat by Allsbrook, during his interview, to fire everyone implicated in the union activity until he got the right man. I note that none of the other interviewees testified to such a threat being made during his interview. Mosley impressed me as one given to exaggerations, and I am not disposed to credit him except in those instances where his testimony is either uncontradicted or corroborated directly or indirectly. Under these circumstances, including Allsbrook's specific denial, I am not persuaded that such a threat was, in fact, made by Allsbrook and I therefore do not credit Mosley's testimony in this regard.

versation with Dalton after Dalton left Allsbrook's office in which he told Dalton that he, Dalton, was lying about it. Since Roller had sent Dalton to Allsbrook's office at the behest of Allsbrook and since Roller testified that he was not aware of Allsbrook's reason for wanting Dalton, I am persuaded from all the circumstances, and find, that Roller was giving vent to his curiosity by making this inquiry from Dalton about what Allsbrook had to say. I find further that, by this time, Roller was aware of the union activity in the plant and was, as revealed by Mosley's testimony, trying to pinpoint the instigators of such activity, and that, in furtherance thereof, he sought an admission from Dalton that he knew something about this. Accordingly, I credit both Mosley and Dalton and find that, after they left their respective interviews with Allsbrook, they were further interrogated by Roller in the manner testified to by them.

2. The events following the union meeting on Monday, February 28, up to March 9, the date of the Union's petition for a Board election

According to employee Kenneth R. Stracener, he asked Allsbrook on March 2 or 3, whether the men would continue to get their 50 hour week[14] and that Allsbrook replied, "No, if the union gets in you'll not get over 40 hours a week," adding that Nelson would either hire enough men to take care of the extra work or, if necessary, he would move the plant to Illinois. Allsbrook admitted having discussions with employees about such matters as overtime work, straight-time work, and wage rates. As to overtime work, he stated that he explained to employees the difference between overtime pay and regular-time pay on the basis of 40 and 50 hours, using the figure of $2.63, which he viewed as the union rate, as the basis for his projection of the pay for a 40

[14] According to Stracener, he had worked a 50-hour week consistently since his employment by Respondent.

hour week. While Allsbrook denied making the statement during these discussions that if the Union came into the plant the Company would, in retaliation, cut back their hours, I am persuaded, as heretofore found with respect to such discussions during the employee interviews in his office, that the unmistakable innuendo of Allsbrook's own version of his remarks concerning overtime was that if the Union came into the plant, there would be no overtime but only a 40 hour week. I, therefore, credit Stracener's testimony in this respect. I am persuaded, too, that, as found in the case of Allsbrook's interviews of Dalton and Handley, Allsbrook threatened Stracener, as Stracener, also testified, with the removal of the plant to Illinois because of the advent of the Union.

On March 3 and again on March 4, according to the testimony of employee Harry D. Ray, Foreman Garrison spoke to him about the Union while at work, asking him on the first occasion whether he was "really going to vote for the Union," to which he replied in the affirmative; and on the second occasion whether he was "still going to vote for the Union," to which he made the same reply. According to Ray, on the latter occasion, Garrison remarked that, "if the union got in [he] wouldn't get but one raise a year and [he] would be better off if they didn't get in." Garrison admitted having discussions with Ray and Mosley about the Union but not with any others,[15] and added that while he was present on other occasions when the men were discussing the Union, during their free time, he was just a listener and no questions were directed at him by the men. Garrison denied asking Ray about how he was going to vote but did not specifically deny the promise of benefit

[15] At another point in his testimony, Garrison said that "a number of them" asked him "what he thought the Company would do if [the Union] got in" and that he answered only that he did not know company policy.

attributed to him by Ray.[16] In view of my findings hereinafter that Garrison did, in fact, have discussions about the Union with employees other than Ray and Mosley, in view of Garrison's failure specifically to deny that part of Ray's testimony pertaining to the promise of benefit to him by Garrison, and since Ray impressed me as a truthful witness, I credit Ray's testimony rather than Garrison's denial and find that Garrison interrogated him and promised him benefits in the manner described above.

On or about March 5, according to Mosley, he had a discussion with Garrison about the Union which was initiated either by his or by Garrison's inquiry as to how the other felt about the Union. Mosley testified further that Garrison said that, "if we brought the Union in we were "....."[17] our selves, that we'd be anywhere from $500 or $600 better off within 6 or 8 months' time if we didn't bring the Union in." According to employee Handley, he overheard Garrison make this remark, but he did not identify when or to whom it was said.[18] Garrison denied having any such conversation with Mosley. He admitted having only one conversation with him, at a time before the signing of union authorization cards began, during which Mosley asked him, and he refused, "to [help] put the Union in." As I have heretofore discredited Garrison's denial that he interrogated Ray about the Union and made a promise of benefit to him if the Union did not come into the plant, and in view of my findings hereinafter that similar remarks were made

[16] Garrison did deny generally that he ever promised any employee economic benefits and other benefits if he refrained from becoming or remaining a member of the Union.

[17] An obscenity.

[18] Mosley, in response to questions by Respondent's counsel as to who else was present during the various conversations with a representative of management adverted to in his testimony, did not say that anyone else was present during this particular conversation.

to other employees by Garrison, I credit Mosley and find that Garrison did make this promise of benefit to him in the manner described by him.

Mosley testified to a conversation with Roller on or about March 7, during which Roller said to Mosley, in the presence of Handley, that he had heard that Mosley was talking union on company time and, if it was not stopped, Mosley would be fired. However, Handley testified to being present at a conversation between Roller and Mosley concerning the matter of a rumor in the plant that anybody who was for the Union would be fired. According to Handley, Roller said that a rumor to that effect had been started but that it was false. Roller's version of a conversation with Mosley, in the presence of Handley, was similar to that of Handley. Under all the circumstances, I am persuaded that Mosley was exaggerating what was said at that time. I therefore credit Roller's version, as corroborated, in the main, by Handley, and find that he did not threaten to fire Mosley for talking union on company time.

As already found, the Union requested recognition from Respondent in a unit of its production and maintenance employees by letter dated March 7. On or about March 8, also according to the testimony of Mosley, Garrison spoke to Ray and him casting aspersions on the bona fides of the Union's request for recognition and inquiring whether he knew how Roy Smith was going to vote. And when he answered Garrison's inquiry in the affirmative, Garrison replied that he also knew how Roy Smith was going to vote but that he, Garrison, was "going to do everything in [his] power" to change Roy Smith's mind. Roy Smith did not testify in this proceeding, and Garrison denied that he made any such inquiry or comment involving Roy Smith. In the absence of corroborating testimony, and since I have found Mosley not credible at times, I am not persuaded that this

conversation took place. I therefore do not credit Mosley in this respect.

3. The events following the filing of the representation petition by the Union on March 9

On or about March 11, according to employee Ray, he asked Garrison, as the latter walked by his place of work, what the Company thought of the Union's petition. Garrison replied that the Company was not too worried about it and asked Ray why he thought his chances were better with a union than without a union. When, also according to Ray, he mentioned that he would earn more and also criticized the delay by the Company in furnishing employees with an insurance policy, Garrison replied, "well dadgum you're just .....[19] yourself voting for the Union." While Garrison denied generally that he made any threats of economic reprisals to employees on various dates, including March 11, he did not specifically deny that the conversation took place or that he made the threat attributed to him by Ray. In these circumstances and since, as I have already noted, Ray impressed me as a truthful witness, I credit Ray rather than Garrison.

About the same time, that is, March 10, 11, or 12, according to Handley, Mosley and he had a conversation with Garrison in which Garrison said that the Union did not have a chance to win the election, whereupon he diputed this, claiming the Union already had the election "in the bag." Also, according to Handley, when he inquired why the Company in Illinois (meaning the parent Company) did not have a union when Illinois was a "union state," Garrison answered that this was because "the Company took care of the boys that voted 'no.'" This same theme was repeated, according to Handley, in another conversa-

[19] An obscenity.

tion involving the same individuals at a time which is not pinpointed in the record. He testified that Garrison told them that the Union did not have a chance to win the election, a matter which he disputed; and Garrison said further that they "should go along with the Company and that the Company never made a promise that they didn't keep." Mosley did not testify as to these incidents. However, Garrison specifically denied that such conversation took place. In another instance, I have not credited Handley in the face of a denial by a representative of management and in the absence of testimony concerning the conversation by Mosley who was assertedly present at the time. I am similarly unpersuaded here. I find, therefore, in accordance with Garrison's denial, that the conversation or conversations did not occur.

Stracener testified to a discussion involving him and Plant Manager Allsbrook about this time. According to him, he questioned Allsbrook as to how they would arrive at a pay scale for the welders and Allsbrook's reply was that if the Union came into the plant, the welders would have to take a certification test for which the welders would have to pay out of their own pocket, and, further, that the Company did not need certified welders and if the welders did not want to continue working at the present wage rate, they could go elsewhere. When questioned, on direct examination, about having had any conversation with employees concerning the matter of welder certification, Allsbrook replied, "No, no direct," explaining that the only conversation he had about this matter was with a group of men.[20] Allsbrook testified further that he told the group that other factories had been unionized and had thereafter used

[20] Allsbrook could remember only the names of employees Dalton and Willie Myers and of Foreman Roller, but fixed the number present as four or five.

certified people for their particular type of work. He denied that he threatened the group that Respondent would do the same or that the welders have to pay for the certification test or that Respondent did not need certified welders for its type of work or that if the men did not want to work at Respondent's current wage scale they could go elsewhere. I note, in this connection, that Allsbrook testified that he learned about the matter of certification in 1961 and 1962 from employees applying for work. Allsbrook named one, Scollard, who told him of working in a shipyard in California where there was a certification requirement and where he, Scollard, had to pay for the certification. There is thus a striking similarity between what, according to Allsbrook, Scollard told him about paying for the test and Stracener's testimony as to what Allsbrook said to him on the same point. I am persuaded, and find, under all the circumstances, including my prior findings that Allsbrook did not testify credibly concerning what happened during the office interviews on February 25, and thereafter, and the fact that Stracener impressed me as a credible witness, that this discussion occurred in the manner testified to by Stracener.[21]

There is also testimony by employee Underwood concerning two incidents of interrogation by Garrison during the middle of March. Although Underwood seemed unsure of the respective dates of each conversation, he appeared certain of their chronological sequence. I find that these conversations did occur about the middle of March on different days in close proximity to each other and in the following sequence. During the first conversation, according to Under-

[21] Here again, Allsbrook testified on cross-examination that he did not tell employees that certification would be required at the plant but let them draw their own conclusion. I am persuaded, here, too, that the unmistakable innuendo of Allsbrook's own testimony was that certification would be required.

wood, Garrison asked him what benefits he expected to get from the Union and, in the course thereof, Garrison made the remark that, "if the Union didn't come in [he] would be $500.00 better off." During the next conversation, also according to Underwood, Garrison inquired from him as to whether he knew why the Company could operate in "union country up in Illinois" and not be unionized. He testified further that Garrison said, during this conversation, that, "even if the Union got in, Mr. Nelson wouldn't negotiate with you and he had been handling things up in Illinois for so many years and he knew how to handle these situations." Garrison specifically denied the above testimony by Underwood. I have heretofore found Underwood to be a credible witness. I credit this testimony of Underwood, which I find to be more credible than that of Garrison.[22]

Employee Stracener testified that around March 16, he queried Roller as to how he felt about the Union. To this, Roller replied that he did not have much to say about it one way or the other, adding that "the only thing he could tell [them] for sure is the fact that if it went Union that we wouldn't be getting as many hours as we were normally putting in and that a lot of the deadbeats who were out there would be eliminated." Although Roller specifically denied making these statements, I credit Stracener's testimony. I note, in this connection, that the threat of loss of earnings by Roller if the plant was unionized was, in substance, the same as that already found herein to have been made by Allsbrook during the series of interviews of employees in his office.

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[22] Although Handley testified, in effect, that Garrison told Mosley that Nelson would not bargain with the Union and he overheard it, I find it unnecessary, in view of my finding above, to make any findings as to this testimony which was not corroborated by Mosley and was also denied by Garrison.

Stracener also testified to a conversation with Garrison on or about March 18, as follows: Stracener commented to Garrison that, "the pains couldn't be much worse" with a union as without one. Thereupon, Garrison asked him what benefits he could expect to obtain by belonging to the Union. During this conversation, Garrison told him that, "Mr. Nelson would do everything that he could to keep tht Union from coming in—he had dealt with the Union problems before and that he knew how to handle them."[23] I note that the latter part of the remark attributed to Garrison was similar to the one attributed to him by Underwood, whom I credited. In all these circumstances, as well as the fact that I have heretofore found Stracener to be a credible witness, I credit Stracener.

Stracener attested to a further conversation on March 17 or 18, between Allsbrook and him as follows: At that time, Stracener sought out Allsbrook in order to ask him for sick leave permission. Allsbrook asked him whether he had signed a union card and he admitted that he had done so. Whereupon, Allsbrook said that Stracener was the only one who had outrightly stated this without evading the question. Allsbrook also remarked that he would show Stracener on pencil and paper that if "we went union that we would be making $6.00 to $8.00 less than what we're getting now as take-home pay and that there were a lot of deadbeats out in the shop that if we went union would be weeded out pretty quick." Allsbrook denied making any of these remarks which Stracener attributed to him. He admitted, however, telling Stracener on March 15 or thereabouts what he had told the group of employees in February, *viz.*, that if he, Stracener, worked 40 hours under union scale, he

[23] Mosley also testified that Garrison had told him at or about this time that, "Nelson would deal with the men that signed union cards because they had always kept the union out of the Illinois plant."

would not draw as much as he was presently drawing working 50 hours. However, I have heretofore discredited Allsbrook's testimony that his remarks on this matter were so limited. In these circumstances, and since I find Stracener to be more credible than Allsbrook, I find that Allsbrook did make the remarks attributed to him by Stracener.

During the week before the election of March 29, according to Mosley, Garrison said to him in the course of discussion about the Union, "Well you won't be here in six months regardless of whether the Union comes in or out." Although Mosley placed Dalton at this conversation, Dalton did not testify concerning it. There was testimony by Handley that he overheard Garrison make this remark to Mosley a few days before the election. Garrison, however, denied telling this to Mosley. In these circumstances, I am not persuaded that this conversation did occur, as Mosley testified.

There is further testimony by Dalton as to conversation between Garrison and him about 2 or 3 work days before the election, during which Garrison asked him what benefits he, Dalton, expected to get from the Union. A discussion ensued in which he spoke generally about benefits that could be gained by the men by group rather than individual action. He indicated that he was excluding benefits to himself because he planned to leave before the end of the summer. At this point, also according to Dalton, Garrison said, "you guys are just .....[24] yourself by fooling with this union." And when Dalton disagreed and suggested a 50-cent an hour raise as a possibility, Garrison replied, "You aren't going to get .....[25] out of Mr. Nelson." Dalton testified further that about 15 minutes later, he inquired

[24] An obscenity.

[25] An obscenity.

from Garrison, upon the latter's return to the same work area, what Garrison meant by the first mentioned obscene remark. Garrison thereupon explained that, "Well, 5 or 6 months from now you will be $500.00 better off if the union activity was dropped and the Union don't get in rather than if you go ahead and bring them in." Garrison specifically denied making these remarks. Since Dalton impressed me as a credible witness, and since I have heretofore found over Garrison's denials that he made similar remarks, also using obscenity, to employees Mosley and Ray, I credit Dalton rather than Garrison, in all the circumstances.

4. Conclusion as to the 8(a)(1) allegations of the complaint

It is apparent from all the foregoing that the conduct of Respondent dating from February 25, which was shortly after organizational activity began at the plant and became known to Respondent, until shortly before March 29, the date of the election, exceeded permissible bounds under the Act. Indeed, contrary to Respondent's contention, the interrogation was not isolated, nor did it occur in a context free from evidence of intent to discriminate against employees who associated themselves with the Union's organizational activity.[26] Thus, Allsbrook's first move was to summon at least six employees, one at a time, to his office and there interrogate them about the Union and what they knew

[26] Although Respondent introduced evidence to show that Vice President Nelson met with its supervisors on or about March 10 or 11 and told them not to interrogate employees as to union activity or make any promises or threats in relation to union activity, this evidence avails it nothing. For, whether or not such instructions were given, the fact remains, as I have found, that they did engage in such conduct and such conduct is attributable to Respondent because they are admittedly its supervisors and agents. I note, too, that the conduct violative of Section 8(a)(1) of the Act found herein occurred both before and after the above mentioned date of the meeting or meetings.

about it and threaten them, *inter alia,* with economic detriment in the form of less hours and loss of earnings if the Union came into the plant. This effort by Allsbrook to dissuade employees from selecting a union through threats of economic detriment is, under well-established authority, violative of Section 8(a)(1).[27] And acts of interrogation, as here, occurring in such a context, are also clearly violative of the Act.[28] During the month that followed these interviews, Foremen Roller and Garrison, as well as Allsbrook, gave further expression to Respondent's opposition to the Union in violation of Section 8(a)(1) of the Act, by engaging in acts of interrogation of employees; in threats of less hours and reduced earnings, of closing or of moving the plant, if the Union came into the plant, or of not bargaining if the Union won the election; and in promises of benefits if the latter did not eventuate.[29] Thus, as I have found, Roller interrogated employees Mosley and Dalton about the Union immediately after such interviews;[30] and on March 16, Roller threatened employees Stracener that if the Union came into the plant there would be less hours of work and some employees characterized by him as "deadbeats" would be eliminated. And I have found further that Allsbrook threatened Stracener on March 2 or 3 with the

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[27] See *N.L.R.B.* v. *The Coachman's Inn,* 357 F.2d 134 (C.A. 8), enfg. 147 NLRB 278.

[28] See *Blue Flash Express, Inc.,* 109 NLRB 591, which, contrary to Respondent's contention, supports a finding of violation herein.

Nor do I find that *Bourne Co.* v. *N.L.R.B.,* 332 F.2d 47 (C.A. 2), cited by Respondent, supports its contention that the interrogation herein was not unlawful. Apart from other considerations, here, unlike there, the interrogation occurred in a context of threats.

[29] *N.L.R.B.* v. *The Coachman's Inn, supra; El Pasco Manor, Inc.,* 159 NLRB 1649; and *Filler Products, Inc.,* 159 NLRB 1536.

[30] In view of my finding heretofore crediting Roller's denial that he orally threatened Handley with discharge for engaging in union activity, I find that the allegations of paragraph 7(e) of the amended complaint have not been sustained.

loss of overtime and/or the removal of plant if the Union prevailed in the plant; threatened him again on March 10, 11, or 12 that, with the advent of the Union, welders would have to take certification tests at their own expense but that they would not benefit from such tests as they would either have to continue working at the same rate of pay or go elsewhere; and interrogated him on March 17 or 18 as to whether he had signed a union card, and threatened him with economic detriment and with the elimination of "deadbeats" if the Union came into the plant. Additionally, I have found that Garrison interrogated employee Ray on March 4 and promised him benefits if there were no union in the plant; threatened Mosley on March 5 with economic disadvantage should there be a union in the plant; promised Ray on March 11 that he would earn more without a union, and conversely threatened him that employees would be disadvantaged by voting for the Union; similarly promised Underwood in the middle of March that he would benefit if there were no union, and also threatened him that Respondent would not bargain with the Union; warned Straceener on March 18 that Respondent would take steps to keep the Union out; and, finally, interrogated Dalton about what benefits he expected to get from the Union, threatened that the employees would suffer because of their union activity, that the employees would get no raise if the Union came in and, conversely, would benefit if the Union were kept out.

C. *The refusal to bargain*

1. The appropriate unit

It is admitted, and I find, that all production and maintenance employees of Respondent at its Oklahoma City, Oklahoma, plant, excluding office clerical and professional employees, watchmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose

of collective bargaining within the meaning of Section 9(b) of the Act.

2. The majority issue

As already noted, a claim of majority status and a request for recognition were made by the Union by letter dated March 7 to Respondent. Enclosed with the letter were 30 signed authorization cards of plant employees, whose names were listed in the letter, together with photocopies of these cards; the letter further indicated that the authorization cards were to be returned to the Union after Respondent had examined them and compared the signatures with those on its payroll, and the photocopies of the cards were to be retained by Respondent. By answering letter of March 10, Respondent's Vice President Nelson returned "the material submitted with [the Union's] letter of March 7, 1966, which material we have not examined," and, by way of reply to the request for recognition, Nelson "suggest[ed] that signature cards are themselves notoriously inaccurate in describing the desires of individuals to be represented by a union and that such a desire can only be determined when, as and if an election should be authorized by, and held under the auspices of the National Labor Relations Board." On March 9, a representation petition was filed by the Union with the Regional Director for Region 16 of the Board. Thereafter, on March 29, pursuant to a consent-election agreement, approved by the same Regional Director on March 21, an election was held, which the Union lost by a vote of 18 to 17.

The General Counsel contends that the Union represented a majority on March 7, that Respondent's unlawful conduct prevented the holding of a fair election and that a bargaining order should issue. Respondent challenges the Union's majority, averring in its answer that the election demon-

strated that the Union does not represent a majority of its employees in the appropriate unit; that it had a good-faith doubt of such majority status when recognition was first requested and suggested that the matter be resolved by a Board election; that the Union filed a petition for such election and thereafter joined with Respondent in a stipulation for a consent election, thereby conceding and admitting that there existed a bona fide question concerning representation; and that since March 7 the Union has made no request for recognition or for collective bargaining with respect to these employees. In its brief, Respondent appears to contend further that its refusal to check the Union's cards is not, in and of itself, evidence of bad faith, and that even if it is found to have engaged in conduct violative of Section 8(a)(1), such conduct does not justify a bargaining order.

The parties stipulated that the bargaining unit consisted on March 7 of 36 employees. The Union accordingly needs the authorization of 19 employees to establish its majority status. The General Counsel introduced into evidence 26 signed cards authorizing the Union to represent the signatories in collective bargaining. All these cards bore names of employees who were in the unit on March 7 and were dated either February 28, March 1, 2, or 3. The language on the cards was unequivocal and the record fails to disclose any material misrepresentations at the time of signing. Respondent indicated at the hearing, through its counsel, that it is not questioning the authenticity of the signatures on these cards.

It is therefore clear, and I find, that a majority of the employees, namely 26 out of 36, in the unit found appropriate herein had signed authorization cards at the time of the Union's March 7 bargaining request.

3. Concluding findings as to the refusal to bargain

It is apparent from the answering letter of Vice President Nelson to the Union's March 7 letter requesting recognition and bargaining that Respondent refused to recognize and bargain with the Union and insisted upon going to a Board election as the "only" way in which the matter of recognition and bargaining could be resolved. The Board and the courts have held that an employer violates Section 8(a)(5) of the Act by insisting on a Board election as proof of majority, if such insistence is motivated not by a bona fide doubt as to the Union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union. The employer's motivation can be determined only in the light of all the relevant facts of the case, including other unlawful conduct of the employer.[31]

I am persuaded, and I find, that Respondent's refusal to bargain with the Union on March 10 and thereafter was not motivated by a good-faith desire to determine the Union's majority status, but rather by a desire to gain time within which to dissipate the Union's majority in violation of Section 8(a)(5) of the Act.[32] Even before rejecting the Union's March 7 request for recognition and returning as "not examined" the 30 signed authorization cards, Respond-

[31] *Irving Air Chute Company* v. *N.L.R.B.*, 350 F.2d 176 (C.A. 2), enfg. 149 NLRB 627; *N.L.R.B.* v. *George Groh & Sons*, 329 F.2d 265, 268 (C.A. 10); *N.L.R.B.* v. *F. M. Reeves & Sons*, 273 F.2d 710, 713 (C.A. 10), cert. denied 336 U.S. 919; *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.

[32] Contrary to Respondent's contention, the Union's demand for recognition on March 7, at a time when, as I have already found, it was the majority representative of Respondent's production and maintenance employees did not have to be renewed. The demand was a continuing one. *MacCollum Paper Co., Inc.*, 155 NLRB 900. See also *Burton-Dixie Corporation*, 103 NLRB 880, enfd. 210 F.2d 199.

ent took steps to weaken support for the Union and thereby dissipate its majority.[33] The office interviews with employees on February 25, which Allsbrook admittedly held in an effort to "get at the base of it" and solve the employees' grievances so that they would not want a union, were, I have found, accompanied by acts of interrogation and threats violative of the Act. And, thereafter, both before and after the request for recognition and bargaining, Allsbrook, as well as Foremen Roller and Garrison, continued in the same vein with numerous acts of interrogation, with threats of economic loss if the Union came into the plant, and/or promises of economic advantage if the Union did not prevail and with threats that Respondent would not, in any event, bargain with the Union. This course of conduct demonstrates, and I find, that Respondent's unfair labor practices were aimed at achieving the prevention of the selection of a bargaining representative,[34] or stated otherwise, at achieving Allsbrook's admitted objective of getting the employees not to want a union. Such conduct clearly refutes any good-faith doubt on the part of Respondent.[35]

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[33] Illegal conduct occurring both before and after the demand for recognition, as here, may show bad faith. *NLRB* v. *Boot Ster Mfg. Co.*, 361 F.2d 325 (C.A. 6).

[34] *Luisi Truck Lines*, 160 NLRB 530.

[35] *Joy Silk Mills* v. *N.L.R.B., supra; N.L.R.B.* v. *Storack Corporation*, 357 F.2d 893, 895-897; and *N.L.R.B.* v. *Overnite Transportation Co.*, 308 F.2d 279, 283 (C.A. 4).

The cases of *N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74 (C.A. 2), *Aaron Brothers Company of California*, 158 NLRB 1077, *Strydel Incorporated*, 156 NLRB 1185, *Hammond & Irving Incorporated*, 154 NLRB 1071, and *Cameo Lingerie, Inc.*, 148 NLRB 535, relied upon by Respondent and in which no 8(a)(5) finding was made, are distinguishable on their facts, particularly in that the 8(a)(1) conduct herein was substantial. With particular reference to *Aaron Brothers Company of California, supra*, unlike there, the refusal to recognize the Union on the basis of a profferred card showing was accompanied by an affirmative showing here of bad faith.

Further, even if it be assumed that the rejection of the Union's request of March 7 for recognition and bargaining did not violate Section 8(a)(5), the fact that the Union did have a majority as of that date and thereafter and the further fact that Respondent did prevent a fair election dictate the issuance of a bargaining order as part of the remedy for the above violations of Section 8(a)(1) so as to effectuate the statutory purposes and restore the *status quo ante*.[36] A bargaining order should therefore issue here, despite Respondent's position to the contrary, as any lesser remedy, such as setting aside the election and holding a second election, would allow Respondent to profit by its own wrongdoing.[37]

Upon the basis of the entire record, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[36] See, e.g., *Irving Air Chute Company* v. *N.L.R.B., supra,* and *Summit Mining Corp.* v. *N.L.R.B.*, 260 F.2d 894, 900 (C.A. 3), and cases there cited.

N.L.R.B. v. *Flomatic Corp., supra,* relied upon by Respondent in opposing a bargaining order is inapposite here. In that case, there was only a minimal 8(a)(1) violation and no demand and refusal to bargain. However, here there was a demand and refusal to bargain in a context of acts of interference, restraint, and coercion which were substantial. See, in this connection, *Irving Air Chute Company* v. *N.L.R.B., supra,* and *N.L.R.B.* v. *Delight Bakery, Inc.*, 313 F.2d 344 (C.A. 6), enfg. 145 NLRB 893.

[37] The fact that the Union filed a petition for an election and thereafter joined with Respondent-Employer in a stipulation for a consent election does not, as Respondent-Employer appears to contend, operate to suspend its bargaining duty where, as here, there is other evidence of lack of a good-faith doubt of the Union's majority. See *Irving Air Chute Co.* v. *N.L.R.B., supra.*

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Respondent at its Oklahoma City, Oklahoma, plant, excluding office clerical and professional employees, watchmen, guards, and supervisors as defined in the Act.

5. The Union at all times material has been and is the exclusive representative of the employees in the aforesaid bargaining unit within the meaning of Section 9(a) of the Act.

6. By refusing on and since March 10, 1966, to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid bargaining unit, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The evidence does not establish that Foreman Roller threatened employee Handley with discharge for engaging in union activity, as alleged in paragraph 7(e) of the amended Complaint.

Recommendations Respecting the Election

From the foregoing findings, it necessarily follows that the election should be set aside because of Respondent's un-

fair labor practices committed after the filing of the petition in Case 16—RC—4226, and I so recommend.

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent cease and desist therefrom and from interfering in any like or related manner with the efforts of the Union to bargain collectively with Respondent. I shall also recommend, affirmatively, that Respondent bargain with the Union upon request (a provision which I would recommend under all the circumstances to remedy the violation of Section 8(a)(1), even if there had been no violation of Section 8(a)(5), and post appropriate notices.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees with respect to their union activities or those of fellow employees.

(b) Threatening employees that selection of a union would result in less hours and lower earnings and/or the closing of the plant or its removal; threatening to get rid of so-called "deadbeats" if the Union came into the plant; and threatening that it would not bargain with the Union if it prevailed in the pending election.

(c) Promising employees benefits in order to induce them to reject union representation.

(d) Refusing to bargain collectively in good faith concerning rates of pay, wages, hours of employment, or other conditions of employment with Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees of Respondent at its Oklahoma City, Oklahoma, plant, excluding office clerical and professional employees, watchmen, guards, and supervisors as defined in the Act.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to join or assist a union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the abovenamed Union as the exclusive representative of all employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Post at its plant in Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix";[38] such notice, to be furnished by the Regional Director for Region 16, after being signed by an authorized representative of Respondent, shall be posted immediately upon the receipt

[38] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order," shall be substituted for the words "Pursuant to a Decision and Order."

thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[39]

[39] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYLIE MANUFACTURING COMPANY and LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO	Cases Nos. 16—CA—2638 16—RC—4226 April 2, 1968

SUPPLEMENTAL DECISION AND ORDER

On January 10, 1967, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, in which it adopted the Trial Examiner's findings that, *inter alia*, Respondent had interrogated, coerced, and threatened employees in violation of Section 8(a)(1) of the National Labor Relations Act, and had refused to bargain with the Union, which was the majority representative of the employees in the unit stipulated to be appropriate for the purposes of collective bargaining, in violation of Section 8(a)(5) of the Act. On February 23, 1967, Respondent filed with the Board a Petition to Reopen Proceeding for Further Hearing, on the group that allegedly newly-discovered evidence revealed that the Union did not represent an uncoerced majority because the authorization cards were obtained by threats, intimidation, and coercion. The General Counsel, in response, filed a Motion in Opposition to Respondent's Petition. On May 10, 1967, the Board issued an Order Remanding Proceeding to Regional Director for Further Hearing, in which it granted the Respondent's petition, ordered a further hearing before the Trial Examiner for the purpose of taking evidence on the issues raised by the petition and the General Counsel's opposition thereto, and directed the Trial Examiner, upon

concluson of the hearing, to prepare and serve upon the parties a Supplemental Decision containing findings of fact, conclusions of law, and recommendations. Pursuant to notice, a supplementary hearing was held on June 20, 1967, at Oklahoma City, Oklahoma, before Trial Examiner Harry H. Kuskin.

On October 30, 1967, the Trial Examiner issued the attached Supplemental Decision affirming his findings, conclusions, and recommendations in his original decision, on the issued remanded. Thereafter, the Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the reopened hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and brief, and the entire record in the case with regard to the issues remanded, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

IT IS HEREBY ORDERED that upon reconsideration, the original Decision and Order in this proceeding be, and it hereby is, affirmed.

Dated, Washington, D. C.

(SEAL)

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HARRY H. KUSKIN, Trial Examiner: On January 10, 1967, the Board issued its Decision and Order herein finding that Respondent-Employer, also referred to herein as Respondent, had, *inter alia*, interrogated, coerced, and threatened employees in violation of Section 8(a)(1) of the Act, and had refused to bargain with the Union which was the majority representative of the employees in the unit stipulated to be appropriate for the purposes of collective bargaining, in violation of Section 8(a)(5) of the Act. More specifically, as to the latter violation, the Board found that (1) on the basis of 26 out of a possible 36 authorization cards, the authenticity of the signatures thereon being unquestioned, the Union had majority status in the appropriate unit; (2) Respondent's refusal to bargain with the Union since March 10, 1966, was, as demonstrated by Respondent's conduct violative of Section 8(a)(1) both before and after the Union's bargaining request of that date, not motivated by a good-faith desire to determine the Union's majority status but rather by a desire to gain time within which to dissipate the Union's majority; and (3) Respondent's duty to bargain with the Union was unaffected by the fact that the Union lost a Board-ordered election, held on March 29, in the appropriate unit, because Respondent's aforesaid unlawful 8(a)(1) conduct had prevented a fair election from being held and required that the election be set aside. On February 23, 1967, Respondent filed with the Board a Petition to Reopen Proceeding for Further Hearing on the ground that allegedly newly-discovered evidence reveals that the Union did not represent an uncoerced majorty because the authorization cards were obtained by threats, intimidation and coercion; it attached affidavits by

employees Hernandez, Steinweiss and Yost and a signed but undated letter by Hernandez in support thereof.[1] Thereafter, the General Counsel filed a Motion in Opposition to Respondent's Petition. On May 10, 1967, the Board issued an order reopening the record and remanding the proceeding for further hearing before me, the Trial Examiner in the initial hearing herein, "for the purpose of taking evidence on the issues raised by the petition and the General Counsel's opposition thereto." The Board further ordered that upon conclusion of such hearing, I issue a supplemental decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received pursuant to the provisions of such order. In accordance therewith, I conducted a further hearing on June 28, 1967, at Oklahoma City, Oklahoma.

Upon the entire record[2] and from my observation of the witnesses, and after due consideration of the briefs of the General Counsel and Respondent-Employer, I make the following:

Findings of Fact and Conclusions of Law

The evidence adduced at the reopened hearing, Respondent contends, requires a finding that there was a "persuasive pattern of threats, intimidation and coercion in the Union's efforts to secure authorization cards," which invali-

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[1] In the interim between the Board's Decision and Order herein, and Respondent's Petition to Reopen, Respondent petitioned the United States Court of Appeals for the Tenth Circuit for review of the Board's Decision and Order. However, after filing the instant Petition, Respondent filed with the Court a Motion for Leave to Withdraw Petition for Review, which was granted on March 2, 1967, without prejudice to subsequent refiling.

[2] As corrected in accordance with Respondent's Motion to Correct Transcript dated "July .. 1967," as to which the General Counsel has filed no objections, and which I hereby grant.

dates any claim of majority status based on these cards. It points in this connection to testimony by witnesses in its behalf attributing coercive conduct to employees Jack Wraford Mosley and Kenneth W. Dalton,[3] and to other testimony by some of them of harassment by pro-union men at the plant. In the interest of an orderely presentation, I shall group the relevant evidence pertaining to Mosley separately from that relating to Dalton.

MOSLEY

Employee Werner Steinweiss testified that about 3 days before he signed an authorization card for the Union, he had a conversation with Mosley in the plant, and that Mosley then said to him that if "[he] did not sign the card, he [Mosley] would knock the s--t out of [him]." Steinweiss testified further that when he actually signed an authorization card on March 3, 1966, he did so at the request of employee Handley and out of the presence of Mosley. Although Steinweiss placed other employees, including his brother and one Kenneth Gregory, within 10 feet of Mosley and him at the time of their above conversation and further testified that Mosley spoke to him in his ordinary voice which was audible about 10 feet away, neither his brother nor Gregory testified in this proceeding. And although Steinweiss testified that this threat happened several times "before we signed the cards," he could not recall the actual number of times and gave no further details. It is, however, clear from his testimony that he was attributing to Mosley only one such threat to him. There was also testimony by Steinweiss that Mosley was after him for a long time in connection with signing a card

[3] Mosley testified that he left Respondent's employ on March 29, 1966, the day of the election; and Dalton left about a year prior to the hearing herein, according to the testimony of Hernandez.

and that Mosley called him names.[4] In this connection, Steinweiss admitted that the statement in his affidavit attached to Respondent's petition herein to reopen had a misstatement by him insofar as it attributed harassing conduct to get him to sign a card to pro-union men, since he meant only Mosley. In addition, Steinweiss placed such name calling, first at his workplace and then at his workplace and in the restroom, and when pressed by the General Counsel to say when these incidents occurred, his answer was "I did ten hours a day down there, so it was several times." I note, too, that, while Steinweiss testified this name calling had been occurring for a long time before he signed the card for the Union, the record establishes that the solicitation of signatures to authorization cards began at the first union meeting on February 28, 3 days before he signed a card. In respect of all the foregoing, Mosley admitted that he threatened to kick the s--t out of Steinweiss on one occasion but placed it in a different context, unrelated to union activity. This occurred, according to Mosley, "a couple of months before" the time fixed by Steinweiss and was in relation to a square belonging to him which he found in Steinweiss' toolbox; he then told Steinweiss that if he ever found any of his tools around Steinweiss' box, "[he] might kick the s--t out of him." In rebuttal, Steinweiss denied that any such incident between Mosley and him involving his toolbox ever occurred. Mosley further acknowledged having discussions with Steinweiss in the plant between February 28 and March 29 about union activity but denied there was ever "any violence or otherwise brought into it at all" and, in those instances in which he had arguments or misunderstandings with Steinweiss, they were unrelated to union activity.

[4] The names are unidentified in the record.

Employee Ernest Yost testified that on March 1, 1966, the day after the first union meeting, he overheard a conversation between Mosley and employee Turner in the sheet metal department, near the drill press. It would appear from his testimony that the physical circumstances were then as follows: Turner was operating this drill press,[5] which does not make "a lot" of noise. There was other equipment in this vicinity consisting of a brake, a smaller drill press and a shear, and these machines make "quite a bit" of noise. Mosley was standing next to the drill press and Yost was standing about 3 or 4 feet away, grinding soapstone on a grinder, a machine which does not make "a whole lot of noise."[6] As to the content of this conversation, it is the testimony of Yost that it took 3, 4 or 5 minutes, that "there was not much to it"; and that, to the best of his knowledge, Mosley "accused [Turner] of being sent to the Union Hall as a company spy because he didn't sign a card and if he didn't sign a card he would get him and beat the hell out of him"; and that Turner "did not have much to say. He more or less listened." Turner was not called to testify and the record does not indicate that he was then unavailable. Mosley acknowledged having a conversation with Turner on the day in question at Turner's drill press, during which he asked Turner why he did not sign a card at the union meeting the night before, but the

[5] Yost stated specifically, at first, that, when this occurred, Turner was "operating the drill press . . . drilling holes." Thereafter, counsel for Respondent called his attention to his testimony in the following manner: "You testified Turner was actually operating the drill press?"; whereupon, Yost replied, "He was at the drill press whether it was running at the time or not I don't know." In these circumstances, plus my observation of his demeanor on the witness stand, I am persuaded that his first answer reflects the truth more closely, and I so find.

[6] Yost's regular work station in the welding section is about 50 to 75 feet away from the drill press, but he has occasion to use the grinder in connection with his work.

similarity between his testimony and that of Yost stops at this point. According to Mosley, the rest of the conversation proceeded as follows: Turner told him "to be quiet because this place was bugged" by a listening device placed by the Company where they were standing, and he replied that Turner was trying to insult his intelligence and that he, Mosley, knew that Turner was sent out to the union meeting as a company rat. At this point, he left Turner, but Turner followed him, asking him to explain his statement. To this, he replied that he did not want to discuss the matter any further and that Turner knew how he felt about it. Mosley specifically denied making any threats during this incident. Although there is also testimony by employee Underwood with respect to the foregoing, he admitted that he heard only part of the conversation between Mosely and Turner. However, he did corroborate Mosley's testimony that, after the conversation at the drill press, Mosley walked away and Turner followed him up the aisle.

It would appear that Turner did not, at any time after the conversation with Mosley, sign a union authorization card.[7] During cross-examination of Mosley, Respondent adduced testimony to the effect that Mosley left the plant that morning, and, upon his return to the plant in the afternoon, he learned that the police had been at the plant[8] in response to a call by Turner that "they were having a union riot out there." Mosley testified that he was not contacted at any time thereafter by the police or by Respondent about causing a disturbance in the plant that day. It also appears from the testimony of Mosley that he had

[7] Yost, however, did sign a card at the first union meeting, and he testified that he did so free of any threats.

[8] According to Underwood, the police came to the plant around 3 p.m.

no contact with Turner that day other than the conversation described above between Turner and him about 8:15 or 8:20 that morning. According to Underwood, after the police were there, word got around that "it was supposed to have been a riot out there," but "if there was any riot going on, [he] didn't know where it was at." He testified further that, when Mosley left that morning for his doctor's appointment, shopwork was going on in an orderly fashion.

I find that the record fails to establish a nexus between the conversation of Mosley and Turner that morning and the summoning Turner of the police that afternoon. Nor does it establish that there was, in fact, a "union riot" at the plant that day. And with respect to the claimed threat of Mosley to Turner, I find from my observation on the witness stand of Yost,[9] who was the only witness testifying in behalf of Respondent in this connection, and from the background evidence in the record as to Yost, that he is not a reliable witness. Additionally, I am satisfied that the physical conditions in the vicinity of the drill press, at the time Yost claimed to have overheard a threat by Mosley to Turner, detract from any finding herein that Yost accurately overheard what Mosley said to Turner. This is underscored by Yost's limited testimony as to what he knew of this conversation which, he estimated, lasted 3, 4 or 5 minutes. Furthermore, I have already noted that Turner, an actual participant in this conversation who could have given direct evidence thereof, did not testify in this proceeding, even though it was not shown that he was unavailable. Under all these circumstances, including Mosley's denial that he ever threatened Turner that day in the course of asking Turner why he did not sign a card, I find that

[9] See, e.g. my reference to his shifting testimony in footnote 5 *supra.*

Mosley's testimony is more reliable than that of Yost.[10] I therefore conclude, and find, that the record does not preponderate in favor of a finding that Mosley threatened Turner, in the manner testified to by Yost.

I also find unconvincing the testimony of Steinweiss as to the alleged threat to him by Mosley of physical harm if he did not sign an authorization card for the Union. Thus, he admitted that, in his affidavit in support of Respondent's petition herein, he had made a misstatement in attributing harassing conduct to get him to sign a card to other pro-union men, in addition to Mosley. Further, he testified that Mosley had called him names for a long time before he signed a card; yet, at the time he signed a card, only 3 days had elapsed since the solicitation of cards in behalf of the Union began, and when pressed for details as to when the name calling occurred, he replied, vaguely, "I did ten hours a day down there, so it was several times." Additionally although he testified that Mosley had made similar threats to the claimed threat "several times," he could not recall how many times nor did he give any details as to who was involved or when they occurred. Finally, as to whether Steinweiss was, in fact, coerced into signing a card, I note that there was a lapse of 2 days between the claimed threat by Mosley to him and his signing of a card and further that, when he did sign, it was at the request of employee Handley, a request which was devoid of threats and was outside the presence of Mosley. In all these circumstances, and in the absence of any corroborative testimony by employees who were, in fact, in the vicinity and also within hearing distance

[10] I do so with full cognizance of my finding in the Trial Examiner's Decision issued herein after the original hearing that Mosley was one given to exaggeration and that I was not disposed to credit him except in those instances where his testimony is either uncontradicted or corroborated directly or indirectly, which is, for the most part, not the case here.

of the conversation between Steinweiss and Mosley, and in view of Mosley's denial that his treat to Steinweiss was in any way related to union activity, I am persuaded, and find, that Mosley's testimony is more reliable than that of Steinweiss.[11] I therefore conclude, and find, that here too the record does not preponderate in favor of a finding that Mosley threatened Steinweiss in the course of soliciting him to sign a union authorization card, or that Steinweiss was ever coerced by Mosley into signing such a card.[12]

DALTON

Employees Fidencio Hernandez, Earl Edward Oliver and William Anthony Myers testified as to claimed coercive statements made separately to them by Dalton.

Before discussing the testimony of Hernandez on this issue, some background facts as to Hernandez appear to be in order. Hernandez was a moving force behind a petition which circulated in the plant on April 6, 1966, about a week after the election, which the Union lost by a vote of 18 to

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[11] See footnote 10, *supra.*

[12] Respondent, in an apparent effort to reinforce its position that Mosley coercively threatened Steinweiss and Turner in the manner testified to by Steinweiss and Yost, respectively, alludes to an affidavit of employee Gerald M. Smith attached to the General Counsel's Motion in opposition to its petition to reopen. Respondent points to that part in which Smith states that after he voluntarily signed a union card at the union meeting on February 28, 1966, "Mosley told me I'd better vote yes in the election or he'd stomp ..... out of me. I told him he wasn't" (The text of the affidavit is exactly as indicated herein). However, Smith did not testify in this proceeding; the above statement is incomplete; and it does not appear whether these remarks antedated or postdated the securing of the cards which supported the majority finding herein. In all these circumstances, I find that this statement in Smith's affidavit is not determinative on the issue of whether Mosley made coercive threats in the course of soliciting signatures to authorization cards for the Union.

17.[13] The petition read, as follows: "We the undersigned employees of Wylie ....., ... Mfg. Having been defeated in a secret ballot vote, wish to notify Local 850 [the Union herein] that we no longer want them as a bargaining agent." This petition was introduced into evidence as Respondent's Exhibit 1 and carries the signatures of 30 individuals among whom are Steinweiss, Yost, Oliver and Hernandez, witnesses for Respondent herein. According to Hernandez, the petition was held "for a court decision on the matter and perhaps maybe we didn't have to go into this petition." It was on February 8, 1967, about one month after the Board's Decision in this case, that he discussed this threat attributed to Dalton with anyone else and prepared the affidavit thereon which is attached to Respondent's petition to reopen herein.

Hernandez testified that he had conversations with Dalton, who was his leadman in the work area, in the restroom and around the shop, with respect to signing an authorization card for the Union, that Dalton kept after him "using pretty bad tactics," until he did sign a card on March 3, 1966; and that, before he signed, Dalton threatened him that if [he] did not sign, the Union would come in and he and Ted Handley were going to be stewards and they would see to it [he] would lose [his] job and no longer work there.

[13] That he was a moving force is apparent, I find, from Hernandez's testimony that when he heard that some four or five men were going to take court action (apparently a reference to the filing of a charge herein on April 4, 1966) he "talked to some of the boys in the shop and asked how they would feel if we brought up a petition to bring this thing to a close since we thought it was a fair vote and I still think it was," and a petition eventuated at that time. This is further apparent from the testimony of Yost that, on or about January 1967, Hernandez told him and other employees that they were going to get a document drawn up by a lawyer, whereupon "employees chipped in to pay the lawyer's fee to get the letter drawn up," and "it was around that time there was a copy sent to the Labor Board and the senators" and to Respondent.

That if [he] did sign the card they would take care of [him] and [he] would continue to work there and benefit by it."[14] Hernandez testified further that these conversations with Dalton occurred for "around 2 or 3 weeks" before he signed; that, although he "would not say that he was threatened more than that particular time [i.e. when he signed the card]—it was like being threatened, because it was getting so unbearable that [he] just couldn't stand it any more and [he] eventually had to give in and sign this card just to get rid of them."[15] As to the signing itself, Hernandez testified that he signed, in the presence of Dalton, that there were 20 welders working on that day in the welding department along with Dalton and him and that because of the noise one would have to be within about 10 feet of the speaker to hear him. It is clear, however, that Hernandez' testimony was not without its flaws. Thus, when asked whether he was threatened before the first union meeting, which he attended, he answered, "I was given to think that I was. However, it was . . . well, no, sir, I was not." Also when pressed to reconcile his testimony as to his being threatened for about 3 weeks before he signed the card with his testimony that, at that time he signed a card the Union had been organizing "maybe a week or two weeks," he indicated that he meant that he was threatened both before and after he signed the card, that he had been

[14] When asked whether he was told by Dalton when he signed a card that there was going to be an election, Hernandez replied, "No sir, all I was told by Kenneth Dalton was the card would bring it to a head."

[15] In addition to Dalton, Hernandez named employees Handley and Mosley as individuals who harassed him during this period by calling him names and telling him that "it took guts to stand up and be a union man, and join the bandwagon." In this connection, he testified that Mosley approached him and asked, "what's the matter with you? Why don't you join the bandwagon and quit being such a chicken s--t."

threatened several times, but he can recall specifically only the time before he signed. I note, too, that in his affidavit attached to Respondent's petition herein to reopen, which affidavit he acknowledged to be true and correct, Hernandez swore that he "signed a Union card because of four or five weeks of harassment," and that the specific threat by Dalton to him occurred "on several occasions."

Dalton did not testify. There is also no indication that Dalton was then unavailable. The only witness for the General Counsel in respect to the foregoing was employee Underwood, who participated in the solicitation of cards for the Union. According to him, at the time the union activity was going on at the plant, he was working along with Dalton and Hernandez on the same shift and spent a substantial amount of time in the same area with them. It was his further testimony that he did not hear or observe any altercation between Dalton and Hernandez during which Dalton made the threat attributed to him by Hernandez.

As already indicated, there is also testimony in this record by Oliver as to a conversation which he had with Dalton concerning the Union. According to Oliver, who started to work for Respondent on February 24, 1966, this conversation took place in the "bathroom" of the shop about 4 days subsequent thereto. Dalton then told him that, "the boys who didn't sign the cards would not have a job if the Union came in." Oliver did not sign an authorization card at that time. However, he testified further that he was prompted by his concern for his new job to sign a card the next day in the "bathroom" at the request of Underwood.

There remains the testimony of employee William Anthony Myers as to Dalton's remarks to him on the occasion when Dalton approached him in the plant about signing an

authorization card. Myers testified that this incident occurred about 2 or 3 weeks before March 29, 1966, the date of the election. It would thus have postdated the dates on the cards upon which the Union relied for proof of majority (February 28, March 1, 2 or 3), and upon which the Board's majority finding was based. However, when prodded by counsel for Respondent thereafter as to the date, Myers testified that he might be in error. At the time in question, also according to Myers, who supplemented his income by playing weekends regularly as a professional musician at a ballroom in the area, Dalton told him that, "if [he] did not sign a card, he, Dalton, could make it very rough on [him] in the way of being a musician."[16] Myers was a clerk with Respondent and was not eligible to vote in the election. However, at the time of this conversation, he did not know whether he would be eligible.

Oliver and Myers impressed me as credible witnesses, I therefore credit their unrebutted testimony and find that they were threatened by Dalton in the manner testified to by them. However, in view of the uncertainty of Myers as to whether the incident involving Dalton and him antedated or postdated the securing of the cards which supported the majority finding herein, I am unable to find that Myers' testimony reflects adversely upon the validity of these cards.

As to the above detailed testimony of Hernandez, I am convinced, from my observation of his demeanor on the witness stand and taking cognizance of the fact that he was a moving force in seeking, after the election herein, to oust the Union from the plant, that Hernandez allowed his zeal for achieving this latter objective to color his testimony. However, with particular reference to his testimony as to the threat by Dalton, at the time he signed the card, that

[16] Myers indicated that he was a member of a local of the Musicians' Union.

he would lose his job of he did not sign, it stands undenied in the record and also parallels the testimony of Oliver and Myers, whom I found above to be credible witnesses, as to similar threats made to each of them by Dalton. In these circumstances, I find that Hernandez' testimony as to this particular threat is worthy of credit and I credit him in this respect. However, I am uppersuaded by his general testimony of harassment by Dalton at other times, which testimony finds no parallel in the testimony of either Oliver or Myers and I do not credit it. Morever, the so-called harassment which Hernandez also attributed to Mosley and Handley, appears to have been devoid of threats or promises of benefit and was, I find, no more than a permissible type of vigorous campaigning on the part of prounion adherents.

In sum, therefore, the credible evidence herein establishes that, of the two individuals, i.e. Mosley and Dalton, claimed by Respondent to have engaged in coercive threats while soliciting union authorization cards, only Dalton engaged in such conduct.[17] The credible evidence also establishes that, of the three employees threatened by Dalton, only Hernandez signed a card which was among the cards relied upon by the Union to establish its majority.[18] Thus, if the other cards are still valid there would be no reason to alter the finding now extant that the Union had a valid majority based on authorization cards. In this connection, I find that the credible evidence as to the conduct of employee Dalton *vis a vis* employees Hernandez, Oliver and

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[17] The record does not indicate that Dalton's conduct herein was either authorized, or approved or adopted by the Union.

[18] The Trial Examiner's Decision herein, which was adopted by the Board, found that 26 out of 36 employees in the appropriate unit had signed valid authorization cards for the Union.

Myers while soliciting them to sign union authorization cards, falls short, standing alone, of establishing that it was sufficiently extensive or widespread among the employees to establish a pervasive pattern of threats, coercion or intimidation in the Union's efforts to secure such cards.[19] Accordingly, absent such a pervasive pattern and in the light of the entire record, there is no warrant for disturbing the finding in my Trial Examiner's Decision herein, which the Board adopted, that the Union had majority status sufficient, in the circumstances of the case, to support a bargaining order.

Conclusions of Law and Recommendations

1. I adhere to my Conclusion of Law in the Trial Examiner's Decision herein that "The Union at all times material has been and is the exclusive representative of the employees in the aforesaid bargaining unit within the meaning of Section 9(b) of the Act.

2. As no reason appears for disturbing my other Conclusions of Law and my Recommendations in said Trial Ex-

[19] The cases relied upon by Respondent to support a contrary finding are clearly distinguishable for the following reasons, *inter alia*: *N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743 (C.A. 2) involved unlawful statements by union solicitors which were widespread among the employees. In *I. Posner Inc.*, 133 NLRB 1573, the Board relied on other factors, in addition to coercion of some employees into signing cards, such as unauthenticated signatures on some of the cards relied upon and the fact that some employees had also signed cards for the other union in the picture. *Puerto Rico Food Products Corp.*, 111 NLRB 293, involved credited testimony by 10 employees that a supervisor made threats to them of economic reprisal if they did not join the union, which threats were either addressed to, or overheard by, other employees. And in *Lerner Shops of Alabama, Inc.*, 91 NLRB 151, the union in question submitted 8 cards in a unit of 14 employees, and the Board found that 2 of the cards submitted had been obtained by the union's chief proponent by unlawful threats and that, by eliminating these 2 cards, the union's majority became impaired.

aminer's Decision, I also adhere to them and incorporate them herein by reference.

Dated at Washington, D.C.

.....

HARRY H. KUSKIN
Trial Examiner

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 934

WYLIE MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, 1b-7b) is not yet officially reported. The Board's initial decision and order (Pet. App. B, 7b-40b) are reported at 162 NLRB 799; its supplemental decision and order (Pet. App. B, 41b-68b) are reported at 170 NLRB No. 112.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1969 (Pet. 2). The petition for a writ of certiorari was filed on December 8, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that a majority of the employees, without coercion by the union, had signed cards authorizing the union to represent them for purposes of collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. A, 1a-2a).

STATEMENT

During the last week of February, 1966, Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO, began an organizing campaign among the 36 production and maintenance employees at petitioner's Oklahoma City plant (R. 341; 15, 142).[1] Petitioner immediately embarked on an extensive campaign of restraint and coercion, which included interrogating employees about their union activities, threatening them with reprisals if they selected a union representative, and promising them benefits if they rejected the Union (R. 344-346, 349-352; 87-89, 30-31, 63-65, 75, 103-104, 67-68, 43, 44, 53).

[1] "R." refers to the joint appendix filed in the court below.

On March 7, having received signed authorization cards from 30 employees,[2] the Union informed petitioner that it had attained majority status and demanded recognition as the employees' exclusive bargaining representative (R. 342; 197-198). On March 9, without awaiting petitioner's reply, the Union filed a petition for a Board election. Petitioner rejected the Union's request to bargain the following day, insisting upon an election (R. 342; 21, 234). A consent election agreement was entered into, scheduling an election for March 29 (Pet. App. B, 32b).

In the meantime, petitioner continued its program of intimidation, threatening its employees with a shortened workweek, a reduction in wages, the closing of the plant, and the discharge of union supporters if the employees voted for the Union (R. 353-354, 355-359; 32, 45-46, 53-55, 56-57, 89-90). The Union lost the election by a single vote, 18 to 17 (R. 343).

The Board found that, throughout the period of the Union's organizational campaign, petitioner had engaged in widespread acts of restraint and coercion which violated Section 8(a)(1) of the Act and warranted setting the election aside (Pet. App. B, 29b-31b, 37b-38b). The Board further found that the Union had obtained, without coercion, signed authorization cards from a majority of the employees in the unit when it requested recognition.[3] Rejecting peti-

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[2] The cards unequivocally authorized the Union to represent the signatories in collective bargaining (Pet. App. B, 33b).

[3] Although the Union had submitted 30 cards to petitioner, only 26 were introduced at the Board hearing (R. 364). The

tioner's contention that the cards were totally unreliable because of Union coercion, the Board found that, although three employees had been threatened by one Union agent during the campaign, only one had signed an authorization card relied upon by the Union to establish its majority,[4] and that these threats were not "sufficiently extensive or widespread among the employees to establish a pervasive pattern of threats, coercion or intimidation" in the Union's effort to secure authorization cards (Pet. App. B, 56b, 57b). Finally, the Board found that petitioner's refusal to bargain was not in good faith, relying in part on its Section 8(a)(1) violations, and thus that petitioner violated Section 8(a)(5) of the Act (Pet. App. B, 34b-35b). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to bargain with the Union upon its request. The Board found that a bargaining order would be appropriate even had there been no violation of Section 8(a)(5), in order to remedy petitioner's Section 8(a)(1) violations (Pet. App. B, 36b, 38b-40b, 57b-58b, 8b.)

The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court found that a bargaining order was warranted under the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.

Board invalidated one of these (see n. 4, below), leaving the Union with 25 valid cards for a unit of 36 employees. (Pet. App. B, 33b, 56b, n. 18.)

[4] The Board did not count this card in computing the Union's majority status (Pet. App. B, 56b).

ARGUMENT

Petitioner's basic contention is that the Board applied a stricter standard in finding that its misconduct precluded the holding of a fair and free election than it did in finding the Union's misconduct in the solicitation of authorization cards was not sufficient to invalidate the cards *in toto* (Pet. 5-8). But, as the court below properly found, "[w]hen the record is viewed as a whole, it does not disclose inconsistency by the Examiner in his evaluation of the coercive effect of statements by company representatives on the one hand and union adherents on the other" (Pet. App. B, 5b).

What the Board found, on the record here, was that petitioner's acts of restraint and coercion were more extensive and pervasive in their effect than were the Union's acts. The propriety of this conclusion presents essentially only a factual issue not warranting further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Since petitioner interrogated, threatened, and intimidated individual employees on at last 20 separate occasions, the Board not unreasonably concluded that its acts were sufficient to destroy the Union's majority status and preclude the holding of a fair and free election. On the other hand, since there were only three isolated instances of Union misconduct, only one of which affected an authorization card relied upon to establish the Union's majority, the Board properly concluded that the Union's acts were not "sufficiently extensive or widespread among the em-

ployees to establish a pervasive pattern of threats, coercion or intimidation" (Pet. App. B, 57b).

The cases petitioner cites (Pet. 8-9) do not require a contrary conclusion. In *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743, 746-748 (C.A. 2), of the 40 employees who had signed cards, 7 were told that they would lose their jobs unless they did, and 11 employees were subjected to other coercive statements; this is a more pervasive pattern of union intimidation than is present here. In *National Labor Relations Board* v. *Clement Bros. Co.*, 407 F. 2d 1027 (C.A. 5), the employer coerced his employees on at least 16 separate occasions to join a company union, in violation of Section 8(a)(2) of the Act. Although the court in *National Labor Relations Board* v. *S.S. Logan Packing Co.*, 386 F. 2d 562, 565-568 (C.A. 4), noted that the four affidavits by employees alleging that they had been coerced into signing union cards afforded the employer a basis for doubting the union's majority, its underlying rationale for refusing to sustain the Board's bargaining order was its view that "a card check is not a reliable indication of the employees' wishes". This view was rejected in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1970.

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